

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 14, 2005

IN RE:

PETITION OF CITIZENS TELECOMMUNICATIONS
COMPANY OF TENNESSEE LLC FOR EXEMPTION
UNDER TENN. CODE ANN. § 65-5-108(c)

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DOCKET NO.
03-00211

ORDER REACTIVATING DOCKET, CONVENING A CONTESTED CASE,
GRANTING INTERVENTION, DENYING MOTION TO DISMISS,
DENYING MOTION FOR LEAVE TO FILE REPLY AND
APPOINTING A HEARING OFFICER

This matter came before Chairman Pat Miller, Director Deborah Taylor Tate and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on September 27, 2004, for consideration of the *Petition for Exemption Under Tenn. Code Ann. § 65-5-208(c)*¹ ("*Petition for Exemption*") filed by Citizens Telecommunications Company of Tennessee, LLC ("Citizens") on March 19, 2003 and other related filings.

I. BACKGROUND

Following the filing of Citizens' *Petition for Exemption*, Ben Lomand Communications, Inc. ("Ben Lomand") filed a *Petition to Intervene and/or Response or Motion to Dismiss of Ben Lomand Communications, Inc.* ("*Petition to Intervene*") on April 10, 2003. On May 8, 2003, Citizens filed a response² to Ben Lomand's *Petition to Intervene*, and Ben Lomand subsequently filed *Ben Lomand*

¹ Tenn Code Ann. § 65-5-208(c) was changed by codification to § 65-5-108(c) after Citizens filed its petition.

² See *Response of Citizens Telecommunications Company of Tennessee, LLC to Motion Filed by Ben Lomand Communications, Inc. to Intervene and/or Dismiss the Petition for Exemption Under T C A § 65-5-208(c)* (May 8, 2003)

Communications, Inc.'s Motion for Leave to File a Reply to Citizens' Response ("Motion for Leave to File a Reply") on May 12, 2003.

During a regularly scheduled Authority Conference held on July 7, 2003, the panel voted unanimously to hold this proceeding in abeyance pending the resolution of Authority Docket No. 02-01221 due to the similar issues being raised by Ben Lomand and Citizens in Docket No. 02-01221.³ In that docket, Ben Lomand filed a complaint alleging that Citizens' tariff resulted in unjust discrimination because the tariff was offered only to customers in its McMinnville and Sparta exchanges.⁴ On May 25, 2004, Ben Lomand filed a motion to withdraw its complaint. The Hearing Officer in Docket No. 02-01221 granted the withdrawal on June 2, 2004.⁵ After the resolution of Docket No. 02-01221, on September 15, 2004, Citizens filed the *Petitioner's Motion to Revive Docket, Appoint Hearing Officer and Schedule a Status Conference*.

II. SEPTEMBER 27, 2004 AUTHORITY CONFERENCE

During the September 27, 2004 Authority Conference, the panel voted unanimously to reactivate this docket, convene a contested case to consider Citizens' *Petition for Exemption*, grant intervention to Ben Lomand, deny Ben Lomand's motion to dismiss Citizens' *Petition for Exemption*, deny Ben Lomand's *Motion for Leave to File a Reply*, and appoint the Authority's General Counsel or his designee to act as the Hearing Officer in this matter to hear preliminary matters prior to the Hearing and to set a procedural schedule to completion. The panel reactivated this case after finding that this docket no longer needed to be held in abeyance due to the withdrawal of Ben Lomand's complaint in Docket No. 02-01221.⁶

³ See *Order Holding Docket in Abeyance* (October 21, 2003).

⁴ See *In re Complaint of Ben Lomand Communications, Inc., Against Citizens Communications Company of Tennessee LLC d/b/a Frontier Communications of Tennessee*, Docket No. 02-01221, *Complaint*, pp. 3-7 (November 12, 2002).

⁵ See *In re Complaint of Ben Lomand Communications, Inc., Against Citizens Communications Company of Tennessee LLC d/b/a Frontier Communications of Tennessee*, Docket No. 02-01221, *Order Granting Motion of Ben Lomand Communications, Inc. for Approval of Withdrawal of Complaint and Dismissal with Prejudice* (June 2, 2004).

⁶ Transcript of Authority Conference, pp. 32-33 (September 27, 2004).

A. Motion to Dismiss

Tenn. Code Ann. § 65-5-108(c) (2004) requires a determination of the public interest before granting an incumbent local exchange carrier (“ILEC”) exemption from the price floor requirement for any services. Further, the General Assembly has implied that the public interest is served when “existing and potential competition is an effective regulator” of the prices of services.⁷ Ben Lomand argues in support of its motion to dismiss that a rulemaking proceeding is necessary to “determine what factors and guidelines are necessary before relief is granted from the requirement of a price floor.”⁸ Nothing in Section 65-5-108(c) suggests that a rule must, or should, be promulgated to set forth the process for making the requisite showing of public interest. However, the statute’s use of the word “shall” mandates that when such a public interest showing is made, no matter what procedure is used for making such a showing, the Authority must exempt a service or a group of services that are being provided by an ILEC from the requirement of the price floor. The statute’s reference to “an incumbent local exchange telephone company” in the singular suggests that the relief mandated by this statute shall be afforded to an individual incumbent local exchange telephone company when the requisite showing has been made. In these situations, relief provided on an individual basis under particular circumstances can be granted in a contested case proceeding.⁹

In this case, an individual incumbent local exchange telephone company seeks to establish that exempting a service or group of services it provides is in the public interest. Rulemakings are suited for addressing matters that impact the whole or a substantial number of industry members.¹⁰ The request for exemption from the price floor in this case is company specific and fact intensive; therefore, the request is best addressed in the context of a contested case. This procedure is consistent with the approach taken in Docket No 03-00391 wherein the Authority has taken up

⁷ See Tenn Code Ann § 65-5-108(b) (2004)

⁸ *Petition to Intervene and/or Response and Motion to Dismiss of Ben Lomand Communications, Inc* , p 3 (April 10, 2003)

⁹ See *Tenn Cable Television Assn v Tenn Pub Serv Comm’n* , 844 S.W.2d 151, 161 (Tenn. Ct. App 1992)

¹⁰ *Id*

BellSouth Telecommunications, Inc.'s petition for exemption of certain services pursuant to Tenn. Code Ann. § 65-5-108(b). In Docket No. 03-00391, the Authority convened a contested case and granted several interventions rather than instituting a rulemaking proceeding. Based on the foregoing, the panel unanimously voted to deny the motion to dismiss.

B. INTERVENTION

Tenn. Code Ann. § 4-5-310(a) (1998) sets forth the following criteria for granting petitions to intervene.

- (a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:
 - (1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;
 - (2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of the law; and
 - (3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.

Based on a review of the *Petition to Intervene*, the panel found that the legal rights, duties, privileges, immunities or other legal interests of Ben Lomand might be determined in this proceeding, that its *Petition to Intervene* was filed timely and that its intervention would not impair the orderly and prompt conduct of these proceedings.¹¹ For these reasons and applying the standards set forth in Tenn. Code Ann. § 4-5-310(a) (1998), the panel unanimously voted to grant Ben Lomand's *Petition to Intervene*.

C. BEN LOMAND'S MOTION FOR LEAVE TO FILE A REPLY TO CITIZEN'S RESPONSE

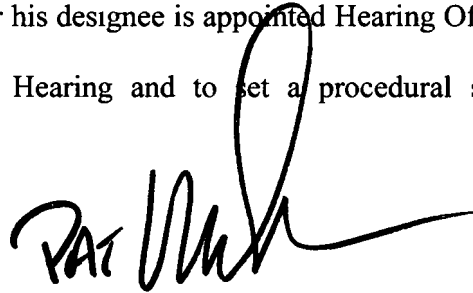
Ben Lomand asked for permission to reply to what it characterizes as Citizens' assertions in its May 8, 2003 filing entitled *Citizens' Response to the Motion Filed by Ben Lomand to Intervene and/or Dismiss the Petition for Exemption* that predatory pricing and below cost pricing are

¹¹ Transcript of Authority Conference, pp 32-33 (September 27, 2004)

acceptable in this matter.¹² To the extent that the Authority's decisions to convene a contested case, deny the motion to dismiss, and grant the intervention render the motion to reply moot, the motion to file a reply is denied. There are two reasons supporting this conclusion. First, Ben Lomand will have the opportunity to address the issues of predatory pricing and below cost pricing in the course of the proceedings in the contested case. Second, the Authority does not require any additional information to rule on the motion to dismiss and to intervene.

IT IS THEREFORE ORDERED THAT:

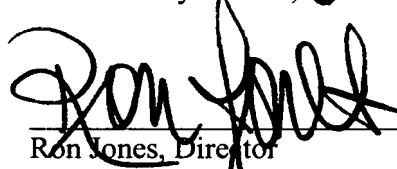
1. This docket is reactivated and a contested case proceeding is convened for the purpose of determining the issues in Citizens' *Petition for Exemption* pursuant to Tenn. Code Ann. § 65-5-108 (2004).
2. Ben Lomand is granted leave to intervene and receive copies of any notices, orders or other documents in this matter.
3. Ben Lomand's motion to dismiss, filed as a part of its *Petition to Intervene* is denied.
4. Ben Lomand's *Motion for Leave to File a Reply* is denied.
5. The Authority's General Counsel or his designee is appointed Hearing Officer in this matter to hear preliminary matters prior to the Hearing and to set a procedural schedule to completion.



Pat Miller, Chairman



Deborah Taylor Tate, Director



Ron Jones, Director

¹² See *Ben Lomand Communications, Inc.'s Motion for Leave to File a Reply to Citizens' Response*, p 1 (May 12, 2004)